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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1230

SANFORD A. SCHAFITZ,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

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FEDERAL COMMUNICATIONS COMMISSION,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Carl L. Shipley, attorney for Sanford A. Schafitz, petitioner herein, respectfully requests in his behalf that the Supreme Court of the United States grant this petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in the above entitled case.

OPINION DELIVERED IN THE COURT BELOW TO BE REVIEWED

The opinion delivered in the United States Court of Appeals is No. 20,645, and involves two orders, the first,

decided January 10, 1967, and the second decided January 11, 1967. Both are set out in the appendix hereto, page A-1.

JURISDICTION

Petitioner relies upon 28 U.S.C. 1254 as the basis for jurisdiction of this Court, and alleges and verily believes that special and important reasons call for a grant of review on writ of certiorari in the sound judicial discretion of this Court within the meaning of Rule 19, as set forth more particularly in the questions presented for review and arguments amplifying reasons relied on for allowance of writ hereinafter set forth.

QUESTIONS PRESENTED FOR REVIEW

1. Was it an abuse of judicial discretion and a denial of due process and equal protection of the laws for the Court below to deny petitioner's motion for an order postponing the hearing date on competing applications in Federal Communications Commission Docket Nos. 16876, 16877, and 16878, in the light of facts and circumstances existing with respect to an unresolved question of petitioner's right to participate as a party in interest in said hearing?

2. Was it an abuse of judicial discretion and a denial of due process and equal protection of the laws for the Court below to dismiss petitioner's appeal from an Order of the Federal Communications Commission on motion of said Federal Communications Commission, without allowing petitioner herein (appellant therein) an opportunity to file a brief and present oral argument on the facts and law in accordance with the appeal procedures provided in the Communications Act of 1934, as amended, 47 U.S.C. 402?

REGULATIONS INVOLVED

47 C.F.R. 0.341:

"(a) After a hearing examiner has been designated to preside at a hearing and until he has issued an initial decision or certified the record to the Commission for decision . . . petitions and other pleadings shall be acted upon by such hearing examiner . . . ".

47 C.F.R. 0.361:

"The Review Board is a permanent body with continuing function. The main function of the Board is to review matters referred to it by the Commission in hearing proceedings. The Board also takes original action on certain interlocutory matters which arise during the course of hearing proceedings. The hearing matters referred to the Board on a regular basis are listed in 0.365. . .".

47 C.F.R. 0.365:

"(a) Unless the Commission specifies to the contrary at the time of designation for hearing or otherwise, the Review Board shall review initial decisions of hearing examiners in all adjudicative proceedings . . .

(b) In adjudicative proceedings conducted by hearing examiners . . . the Review Board shall take original action on the following interlocutory matters . . .

(c) The Review Board shall act on interlocutory appeals from rulings of hearing examiners in adjudicative proceedings . . . See 1.301 of this Chapter . . .".

47 C.F.R. 1.301:

"(a) Any party to a hearing proceeding may file an appeal from an adverse ruling of the presiding officer . . .

NOTE: Unless the ruling complained of is fundamental and affects the conduct of the entire case, appeals should be deferred and raised as exceptions".

47 C.F.R. 1.115:

"(a) Any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission. . . .".

47 C.F.R. 1.223:

"(b) Any other person desiring to participate as a party in any hearing may file a petition for leave to intervene . . . The petition must set forth the interest of petitioner in the proceedings . . . must show how petitioner's participation will assist the Commission in the determination of the issues in question . . . The presiding officer, in his discretion, may grant or deny such petition or may permit intervention by such persons limited to particular issues or to a particular stage of the proceeding."

47 C.F.R. 1.291:

"(5) Each interlocutory pleading shall indicate in its caption whether the pleading is to be acted upon by the Commission, the Review Board, the Chief Hearing Examiner, or the presiding officer. If the pleading is to be acted upon by the presiding officer, he shall be identified by name."

STATUTORY PROVISIONS

47 U.S.C. 402:

"(a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this Chapter . . . shall be brought as provided by and in the manner prescribed in Chapter 19(A) of Title 5.

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

. . . (6) by any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying application . . .".

47 U.S.C. 309

"(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the findings specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining . . .".

CONSTITUTIONAL PROVISION INVOLVED

Amendment 5:

". . . No person shall be deprived of life, liberty, or property, without due process of law; . . .".

STATEMENT OF CASE

In an Order dated May 19, 1966 (FCC 66-44) the Federal Communications Commission invited applications for authority to construct and operate a standard radio broadcast station at Lorain, Ohio. Sanford A. Schafitz, petitioner herein, as an individual timely filed an application in proper form for a construction permit for authorization to operate a standard broadcast station on 1380 kc, 500 w. power, daytime only, at Lorain, Ohio, in accordance with the FCC's invitation for applications. On September 21, 1966, the Federal Communications Commission in an order (FCC 66-837) returned petitioner's application without a full hearing as required by 47 U.S.C. 309(e).

Thereafter on October 5, 1966, the Federal Communications Commission released its Order (FCC 66-839) designating for comparative hearing the applications of three other applicants, who, like petitioner, had timely filed application for the same radio broadcast facilities at Lorain, Ohio in response to the FCC's invitation of May 19, 1966 referred to hereinabove.

On October 17, 1966, petitioner herein filed the following "Petition To Be Made Party and Appearance" with the Federal Communications Commission and not with the Hearing Examiner (See 47 C.F.R. 1.291(5) which re-

quires that each interlocutory pleading "shall indicate in its caption whether the pleading is to be acted upon by the Commission, the Review Board, the chief hearing examiner, or the presiding officer".), as follows:

PETITION TO BE MADE PARTY
AND APPEARANCE

Sanford A. Schafitz, as an individual, in response to the Commission's Order of May 19, 1966 (FCC 66-441) filed an application for the facilities of WWIZ, Inc., if, as and when said facilities become available. On September 21, 1966, the Commission, in its Order (FCC 66-837) returned said application and dismissed the applicant's petition for interim authority, which was also pending, as moot. The Commission action was based on the theory that the application of said Sanford A. Schafitz was repetitious within the meaning of Section 1.519(a) of the Commission's Rules. Sanford A. Schafitz has requested the Commission to reconsider said action and hereby incorporates by reference said petition, and makes it a part hereof.

In said petition Mr. Schafitz also requests the Commission to postpone the October 18, 1966 prehearing conference in the above entitled matter and the November 7, 1966 hearing as presently scheduled, until such time as his right to have his application accepted and designated for hearing in the above entitled matter has been finally adjudicated.

As a supplement to and in connection with said request, petitioner, Sanford A. Schafitz, herewith respectfully requests that he as an individual be made a party in the above entitled proceeding, and herewith enters his appearance for such purpose. In addition, petitioner requests that the above entitled matter be postponed both as to the prehearing conference and the hearing until such time as is right to have his application as an individual accepted for filing and designation for hearing in said proceeding has been finally adjudicated, all as set forth hereinabove.

Respectfully submitted,

SANFORD A. SCHAFITZ

On October 27, the Federal Communications Commission by its Broadcast Bureau filed an opposition to petitioner's "petition to be made party and appearance", as follows:

BROADCAST BUREAU'S OPPOSITION TO
"PETITION TO BE MADE PARTY
AND APPEARANCE"

On October 14, 1966, Sanford A. Schafitz filed a "Petition to be made Party and Appearance". We oppose the petition for the reasons hereinafter set forth.

1. The petitioner asserts that he filed an application for the facilities of WWIZ, Inc., if, as and when said facilities would become available, and that on September 21, 1966, the Commission, in its Order (FCC 66-837) returned his application and dismissed his petition for interim authority. The petitioner states he has requested the Commission to reconsider its action, and as a supplement to and in connection with that request he requests that he be made a party to this proceeding, and "herewith enters his appearance for such purpose." The petitioner further requests that this proceeding be postponed both as to the prehearing conference and the hearing until such time "as is right" to have his application as an individual accepted for filing and designation for hearing in this proceeding has been finally adjudicated. The petitioner requests that his petition for reconsideration be incorporated herein by reference.

2. We construe the instant pleading as a petition to intervene in this proceeding. The request must be denied. The petitioner has made no showing that he is entitled to intervene as a matter of right under the provisions of Section 1.223 of the Commission's Rules, nor does the petitioner make any attempt to justify intervention at the discretion of the Commission as provided for in Section 1.223.

Therefore, the instant petition should be denied.

Respectfully submitted,

GEORGE S. SMITH
Chief, Broadcast Bureau

As may be seen, the Commission opposed petitioner's request to be made a party on grounds he had made no showing to intervene as a matter of right, and further, the Commission elected to construe petitioner's request as a "petition to intervene" instead of a petition for the relief requested in its title. Thereafter, on November 23, 1966, the Commission issued its order (FCC 66M-1572), as follows:

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 66M-1572

92250

In re Applications of	
LORAIN COMMUNITY BROADCASTING COMPANY, Lorain, Ohio	Docket No. 16876 File No. BP-16940
ALLIED BROADCASTING, INC. Lorain, Ohio	Docket No. 16877 File No. BP-17297
MIDWEST BROADCASTING COMPANY Lorain, Ohio	Docket No. 16878 File No. BP-17302
For Construction Permits	

ORDER

The Hearing Examiner having under consideration (1) the "Petition to be Made Party and Appearance" filed by Sanford A. Schafitz on October 17, 1966; (2) the "Opposition of Allied Broadcasting, Inc. to 'Petition to be Made Party and Appearance'" filed on October 25, 1966; (3) the "Broadcast Bureau's Opposition to 'Petition to be Made Party and Appearance'" filed on October 27, 1966; and (4) the "opposition to 'Petition to be Made Party and Appearnace'" filed on October 28, 1966 by Lorain Community Broadcasting Company;

IT APPEARING, that the petitioner requests that he be made a party to the above proceeding, and further requests that this proceeding be postponed both as to the prehearing conference and the hearing until such time as his right to have his ap-

plication accepted for filing and designation for hearing has been finally adjudicated; and

IT FURTHER APPEARING, that on September 21, 1966 the Commission, by its Order, returned the said application of Schafitz and dismissed the applicant's petition for interim authority, which was also pending, as moot. The Commission's action was based on the theory that the application of said Schafitz was substantially the same as the application for renewal of license of Station WWIZ filed by WWIZ, Inc. in 1961 in which Schafitz was the principal party in interest and was, therefore, repetitious within the meaning of Section 1.519(a) of the Commission's rules; and

IT FURTHER APPEARING, that Schafitz has requested the Commission to reconsider its action and has filed the instant petition pending action on said request; and

IT FURTHER APPEARING, that no new facts have been set forth in the petition to be made a party that have not been heretofore considered by the Commission; and

IT FURTHER APPEARING, that Section 1.223 of the Commission's rules requires a showing that petitioner is entitled to intervene as a matter of right, or should be allowed to intervene at the discretion of the Commission. The instant petition makes no such showing; and

IT FURTHER APPEARING, that the petition, insofar as it enters his appearance, must be denied because under Section 1.221 of the rules only applicants whose applications have been designated for hearing, or parties in interest who, on the Commission's own motion, have been named as parties to a hearing, may file written notice of appearance. The petitioner does not qualify under this Section and his appearance must, therefore, be denied; and

IT FURTHER APPEARING, that no good cause has been shown for a grant of said petition and the same must be denied;

Therefore, IT IS ORDERED, this 22nd day of November, 1966, that the "Petition to be Made

Party and Appearance" filed by Sanford A. Schafitz on October 17, 1966, BE, AND THE SAME IS, HEREBY DENIED.

MILLARD F. FRENCH
Hearing Examiner
Federal Communications Commission

/s/ Ben F. Waple
Secretary

Released: November 23, 1966

Petitioner timely filed a Notice of Appeal in the U.S. Court of Appeals for the District of Columbia Circuit, setting forth therein the following statement of reasons on which petitioner herein (appellant therein) intended to rely as follows:

Reasons on which appellant intends to Rely

1. Appellant was denied his right to participate as a party in interest in said hearing, in violation of 47 U.S.C.A. 309(e) and 47 C.F.R. 1.223(b).

2. The FCC acted arbitrarily and capriciously in refusing to postpone the hearing on competing applications pending adjudication of appellant's right to have his application either accepted and designated for hearing, or designated for a full hearing to determine whether it was or was not repetitious within the meaning of 47 C.F.R. 1.519(a), as provided in 47 U.S.C.A. 309(e) and 5 U.S.C.A. 1001(e) and 1008.

On December 27, 1966, the Federal Communications Commission filed a "Motion to Dismiss" in the Court below on grounds that Schafitz had failed to exhaust his administrative remedies, and on the same date filed an "Opposition to a Motion to Postpone Hearing Date", in response to Schafitz's motion to postpone the hearing date as set forth hereinabove.

The Court below granted the Commission's motion to dismiss and denied petitioner's motion to postpone hearing date, as indicated in the two orders which petitioner requests be reviewed by this Court.

REASONS FOR GRANTING A WRIT OF CERTIORARI

Under the policy established by Congress as expressed in 47 U.S.C. 402(a), petitioner is given the right to judicial review of "any order" of the Federal Communications Commission. Significantly, Congress did *not* provide any statutory administrative remedies to be exhausted as a prerequisite to petitioner's right to judicial review, nor did Congress limit the right of judicial review to final orders, etc. The language of the statute is clear to the effect that petitioner has a right to judicial review of "any order", which by its very nature includes interlocutory orders, especially if time be of the essence or there be good and sufficient reasons for immediate judicial review as against delayed judicial review pending the exhaustion of all conceivable administrative remedies an agency might provide, which might lead to a fatal delay making the question at issue moot, as in the present case. This Court has held in *Clyde v. United States*, 80 U.S. 38, that a Federal Court cannot by rule diminish or limit jurisdiction established by an Act of Congress. See also *United States v. Knox*, 128 U.S. 230. Similarly, it would appear the U.S. Court of Appeals cannot deny petitioner his statutory right to judicial review of "any order" of the Federal Communications Commission, either by invoking the doctrine of exhaustion of administrative remedies or by dismissing the appeal prior to briefing and oral argument. While the two decisions of the Court below appealed from herein do not reveal the basis therefor, presumably they were based upon the Federal Communications Commission's motion to dismiss for failure to exhaust administrative remedies.

In any event, this Court has held in *United States v. Sing Tuck*, 194 U.S. 161, that exhaustion of administrative remedies should probably be confined to administrative determinations of fact in dispute, and should not necessarily be applied to require preliminary administrative determinations of questions of law. Moreover,

this Court has denied certiorari in a similar case, *Philadelphia Co. v. S.E.C.*, 164 F.2d 889, cert. den. 333 U.S. 828, where the SEC had moved in the United States Court of Appeals to dismiss an appeal from one of its actions on grounds the action was not an "order". In that case, contrary to its action in petitioner's case, the United States Court of Appeals denied the SEC's motion to dismiss and issued an order staying the SEC's further administrative action. In the *Philadelphia Co.* case, the Court had a similar problem of administrative finality and primary jurisdiction, both of which are aspects of exhaustion of administrative remedies, and the Court balanced the equities and determined that it should exercise its "inherent power to stay administrative orders" and stay administrative proceedings pending judicial review, because considerations justifying a stay far outweighed contrary considerations, and there would be no adverse impact on the parties or the public. In the case at bar petitioner either has a right to be a party to the comparative hearing on his and other applications, or to have a 47 U.S.C. 309(e) hearing to determine on the record whether his application is "repetitious" under 47 C.F.R. 1.519(a). In the meantime no prejudice to any party or the public interest can occur, since WWIZ at Lorain, Ohio is continuing to broadcast under FCC authority until another applicant is granted authority. Petitioner alleges and verily believes that it was an abuse of judicial discretion and a denial of due process on the part of the Court below to deny a stay of administrative proceedings and to deprive him of the opportunity to file a brief, submit the record on appeal, and present oral argument on the facts and law involved. In *Moore v. Illinois C. R. Co.*, 312 U.S. 630, this Court has recognized the principle that permissive administrative remedies, as distinguished from mandatory administrative remedies, need not be exhausted as a prerequisite to judicial review. In the case at bar Congress has not provided any mandatory or permissive administrative remedies in 47 U.S.C. 402, although it has provided the

safeguard of a full hearing for persons in the position of petitioner under 47 U.S.C. 309(e) in cases where an application is denied or refused, etc.

Petitioner calls this Court's attention to a parallel line of cases indicating that due process overlaps the sphere of protection provided by the Federal Constitution respecting equal protection of the laws. *Truax v. Corrigan*, 257 U.S. 312, 322. For example, in *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 476, this Court observed "the opportunity to be heard is an essential requisite of due process of law in judicial proceedings". In *Baker v. Baker, Eccles & Co.*, 242 U.S. 394, 403, this Court recognized that "the fundamental requisite of due process of law in judicial proceedings is the opportunity to be heard." See also *Twining v. New Jersey*, 211 U.S. 78, 111; *Saunders v. Shaw*, 244 U.S. 317; *James v. Appel*, 192 U.S. 129, 137; *Pittsburgh C., C., & St. L. R. v. Backus*, 154 U.S. 421, 426; *Standard Oil Co. v. Missouri*, 224 U.S. 270, 286; *Baldwin v. Traveling Men's Association*, 283 U.S. 522, 524.

While the above cases deal largely with administrative actions of a quasi-judicial nature by State agencies or judicial actions by State Courts, the principle that judicial proceedings are bound under the due process provisions of the Federal Constitution to include an opportunity to be heard must by analogy at least apply to the United States Court of Appeals. In any event, where Congress has provided specifically and in terms that "appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia" it cannot be said that the United States Court of Appeals can limit petitioner's right to a full hearing, including briefs, record, and oral argument, by dismissing his appeal on the Government's motion. See *Clyde v. United States, supra.*

Further, under any view of the record, petitioner herein had in fact and in law exhausted his administra-

tive remedies. For example, the Government in its motion to dismiss cited as a basis for its argument that petitioner had not exhausted his administrative remedies, its regulations in 47 C.F.R. 0.365, 1.115, 1.223(b) and 1.301. This Court may take judicial notice of the fact that 47 C.F.R. 1.301 applies only to any "party to a hearing" in terms of providing an administrative appeal. The record shows the Commission had refused to make petitioner a "party" to the hearing. Of even more significance, 47 C.F.R. 1.291 provides that interlocutory pleadings in hearings "shall indicate" in the caption whether the pleading is to be acted upon "by the Commission, the Review Board, the Chief Hearing Examiner, or the presiding officer". On its face it is plain that petitioner's interlocutory pleading to the Federal Communications Commission was *not* addressed to the presiding officer. (He was not named as required by the rule.)

It was directed to the Commission to handle in any way it saw fit, since time was of the essence, i.e., the question involved the right of petitioner to participate as a party in a hearing, which was then designated to commence on January 11, 1967. It was the Commission and not petitioner, which issued the order appealed from herein under the name of the hearing examiner. The Court's attention is directed to further matters of which it can take judicial notice, i.e., that none of the other paragraphs of 47 C.F.R. relied upon by the Commission as requiring exhaustion of administrative remedies are mandatory or even clearly permissive. Each of the sections cited refers to some aspect of delegated authority and in particular 47 C.F.R. 1.223 does not seem to apply to petitioner's "petition to be made party and appearance" — although the Commission attempted to squeeze petitioner's pleading into the confines of 47 C.F.R. 1.223 (b) by saying in its "Broadcast Bureau's Opposition to Petition to be made Party and Appearance" set forth at length hereinabove, that "we construe the instant pleading as a petition to intervene".

Petitioner respectfully alleges that neither Congress nor the Constitution provides any authority for the Federal Communications Commission to set up a web of administrative remedies to be exhausted by pulling and hauling pleadings all out of shape like some procrustean monster in order to make them fit its rules. In short, an examination of the sections of 47 C.F.R. relied upon by the Commission do not indicate that petitioner had any other permissive or mandatory administrative remedies available even if it be assumed that the Commission acted properly in letting the hearing examiner pass upon its interlocutory pleading, even though it was not addressed to him as provided in the rules, instead of passing upon same itself, to whom it was addressed.

Petitioner alleges that the Court below abused its judicial discretion in denying his motion to stay the hearing in F.C.C. Docket Nos. 16876-8, on three competing applications for facilities at Lorain, Ohio, pending final adjudication of petitioner's statutory right to have his application designated for comparative hearing with the others absent a 47 U.S.C. 309(e) hearing and FCC decision thereafter to the contrary. Violation of petitioner's section 309(e) hearing rights is so obvious and flagrant as to admit of no discretion by the Court below.

Wherefore, because of these considerations, and because petitioner's research does not indicate that this Court has ever passed upon the questions involved herein, it is respectfully submitted that a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,645 September Term, 1966

Sanford A. Schafitz,
Appellant,

v.

Federal Communications Commission,
Appellee.

Before: Fahy, Circuit Judge, Bastian, Senior Circuit Judge, and Robinson, Circuit Judge, in Chambers.

ORDER

On consideration of appellant's motion for an order postponing the hearing date on competing applications in FCC Docket Nos. 16876, 16877, 16878, now scheduled for January 11, 1967, and of appellee's opposition thereto, it is

ORDERED by the court that appellant's aforesaid motion to postpone the hearing date is denied.

Per Curiam.

ORDER

On consideration of appellee's motion to dismiss this appeal and of appellant's opposition thereto, it is

ORDERED by the court that appellee's motion to dismiss be granted and this appeal is dismissed.

Per Curiam.

Circuit Judge Fahy would deny appellee's motion to dismiss this appeal.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1230

SANFORD A. SCHAFITZ, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

Petitioner seeks review of an order of the court of appeals (Pet. A–1) dismissing without opinion his appeal from an order by a hearing examiner of the Federal Communications Commission (Pet. 8–10) denying his application to intervene in a hearing on applications for a radio station in Lorain, Ohio. We submit that the court below acted correctly, that no issue of general importance is presented, and that further review of this case is not warranted.

On March 25, 1964, the Commission denied the application of WWIZ, Inc. for renewal of the license of radio station WWIZ at Lorain, Ohio, and also denied a separate application for transfer of control of WWIZ from Sanford A. Schafitz to the Lorain Journal Company. *WWIZ, Inc.*, 36 F.C.C. 561, rehearing

262-029—67

denied, 37 F.C.C. 685. After extensive administrative proceedings, the Commission concluded that the activities of Schafitz and the Journal had resulted in a transfer of actual control of WWIZ, Inc. to the Journal without prior consent of the Commission, in violation of the Communications Act and of the Commission's rules; and that Schafitz's filing of misinformation and withholding of information in regard to these matters had constituted a clear breach of his duties and responsibilities to the Commission. The court below held that the Commission's findings were supported by substantial evidence, and affirmed. *Lorain Journal Co.* v. *Federal Communications Commission,* 351 F. 2d 824 (C.A.D.C.). This Court denied WWIZ's petition for a writ of certiorari on April 4, 1966, 383 U.S. 967, and on May 16, 1966, denied its petition for rehearing, 384 U.S. 947.

On May 19, 1966, the Federal Communications Commission invited applications for authority to construct and operate a standard broadcast station at Lorain, Ohio to replace the station previously operated by WWIZ. Petitioner tendered such an application, but the Commission returned it because it was substantially identical to the denied renewal application and was therefore repetitious within the meaning of Section 1.519(a) of the Commission's rules, 47 CFR 1.519(a). The Commission denied reconsideration of this action, and on March 9, 1967, its order was affirmed *per curiam* by the court below.[1] *Schafitz* v. *Federal Communications Commission,* C.A.D.C. No. 20721.

[1] The text of the court's order is appended hereto, *infra*, p. 5.

In the meantime, the Commission designated for comparative hearing those applications which had been accepted for filing. On October 17, 1966, Schafitz attempted to intervene in the proceeding (Pet. 6) and to have the hearing postponed. Under the Commission's rules, such petitions are considered by the hearing examiner. 47 CFR 0.341, 1.223(b). The examiner denied Schafitz's request because he found no basis for Schafitz's intervention in view of the return of his earlier application (Pet. 8–10).

The Commission's rules provide that appeals from adverse actions of a hearing examiner may be taken to reviewing authorities within the Commission. 47 CFR 0.365, 1.115, 1.301. Specifically, the Commission's Review Board[2] is empowered to act on appeals from rulings of the hearing examiner in adjudicative proceedings. Additionally, applications for review of the Board's action may be taken to the Commission itself. Schafitz did not avail himself of these procedures, but instead appealed directly to the court below. He also failed to move the Commission for a postponement of the hearing date, but instead filed a motion for such relief directly in the court of appeals. The Commission opposed the motion to postpone and moved to dismiss the appeal on the ground that Schafitz had failed to exhaust his administrative remedies. The court denied the motion to postpone and dismissed the appeal (Pet. A–1).

It is clear that an administrative remedy was readily available whereby review of the examiner's action could have been obtained. In view of Schafitz's

[2] Established pursuant to 47 U.S.C. 155(d).

failure to follow this course, the court below was clearly correct in dismissing the appeal. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 50–51; *Red River Broadcasting Co.* v. *Federal Communications Commission*, 98 F. 2d 282, 284–285 (C.A.D.C.), *certiorari denied*, 305 U.S. 625. See, also, *Spanish International Broadcasting Co.* v. *Federal Communications Commission*, No. 20326, decided April 18, 1967, Slip Op., pp. 15–19 (C.A.D.C.).[3]

By failing to exhaust his administrative remedies, moreover, petitioner denied the Commission an opportunity to rule upon the matter of his intervention. It is well settled that questions which the agency has not been asked to decide will not be considered by a reviewing court. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37; *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U.S. 143, 155. The Federal Communications Act expressly so provides. 47 U.S.C. 155(d)(7), 405. See, also, *Florida Gulfcoast Broadcasters, Inc.* v. *Federal Communications Commission*, 352 F. 2d 726, 727–728 (C.A.D.C.).

The petition for certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

HENRY GELLER,
General Counsel,
Federal Communications Commission.

MAY 1967.

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[3] Petitioner errs in stating (Pet. 11) that review of non-final orders may be had under 47 U.S.C. 402(a). That section provides that review proceedings shall be controlled by the Judicial Review Act of 1950 which expressly limits the jurisdiction of the court of appeals to "final orders." 28 U.S.C. 2342 (1966).

APPENDIX

United States Court of Appeals
For the District of Columbia Circuit

September Term, 1966

No. 20721

SANFORD A. SCHAFITZ, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

Before: DANAHER, BURGER, and WRIGHT,
Circuit Judges, in Chambers

Order

On consideration of appellee's motion to affirm and of appellant's opposition thereto, it is

ORDERED by the court that the appellee's aforesaid motion be granted and the order of the Federal Communications Commission on appeal herein is affirmed. See *Public Service Television, Inc.* v. *FCC*, 115 U.S. App. D.C. 200, 317 F. 2d 900 (1962).

Per Curiam.

U.S. GOVERNMENT PRINTING OFFICE: 1967